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No. 01-1133

Supreme Court U.S.
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In The

Supreme Court of the United States

BRENDA O. SINGER, *et al.*,

Petitioners,

v.

CITY OF ALABASTER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION FOR RESPONDENT BOBBY LEE HARRIS

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QUESTION PRESENTED

Whether the Supreme Court of Alabama correctly affirmed the dismissal of this election contest because the relief requested in the Petitioners' Complaint would violate Section 5 of the Voting Rights Act of 1965.

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BRIEF IN OPPOSITION FOR RESPONDENT BOBBY LEE HARRIS

Respondent Bobby Lee Harris ("Harris") submits that the petition for writ of certiorari filed by Petitioners Brenda O. Singer, et al. ("Petitioners") should be denied. The decisions below, by the Supreme Court of Alabama and the Circuit Court for Shelby County, Alabama, correctly applied Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c ("Section 5") and correctly held that Section 5 requires dismissal of Petitioners' claims.

STATEMENT OF THE CASE

A. Proceedings Below.

A regularly scheduled municipal election of the City of Alabaster, Alabama ("the City") was held on August 22, 2000. In one of the races that was part of this election, Harris was reelected to the Alabaster City Council as councilman for Ward 1, the only majority-black ward of the City's seven council wards. Harris was at the time of the election and is now the only black member of the City Council.

On August 28, 2000, Petitioners filed a Complaint and Statement to Contest Municipal Election (the "Complaint") in Alabama state court with respect to Harris' election. Petitioners are residents who were brought into the City by annexation before the August 22 election. Prior to the election, the City assigned Petitioners, along with other annexed residents in their subdivision, to vote in Ward 1 for council election purposes. However, the United States Attorney General (the "Attorney General")

objected to this ward designation pursuant to Section 5 of the Voting Rights Act of 1965. Under Section 5, which is designed to prevent racial discrimination in voting practices, voting changes (such as ward designations) in covered jurisdictions must receive federal approval (known as preclearance) from the Attorney General or the United States District Court for the District of Columbia before such changes can be given legal effect.

The basis for the Attorney General's objection in this instance was that assigning these residents, nearly all of whom are white, to Ward 1 would change Ward 1 to a majority-white ward and would dilute the black vote in the only majority-black ward in the City. In light of the Attorney General's objection, the City was prohibited by federal law from counting, and did not count, the votes of the annexed residents toward the official vote totals in the Ward 1 race.[1]

Petitioners alleged in the Complaint that their votes, along with the votes of other annexed residents in their subdivision, were unlawfully excluded from this election, and that Harris' election opponent (who is white) would have prevailed if these votes had been counted in the Ward 1 race. The Complaint, naming Harris, the City, and the City's mayor as defendants, asserted the following grounds for contesting Harris' election: (1) Section 11-46-69 of the Code of Alabama, 1975, which provides that an election may be set aside because of the "misconduct" of elected officials or "[t]he rejection of legal

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[1] In their certiorari petition, Petitioners have thus mischaracterized their status as "qualified" voters in the Ward 1 race.

votes"; (2) denial of equal protection and of the right to vote under the United States and Alabama Constitutions; and (3) Section 2 of the Voting Rights Act of 1965. Petition at 24a.

Despite Petitioners' efforts in their certiorari petition to portray their Complaint as a global challenge to the entire City election which was held on August 22, 2000, the *only* relief requested in the Complaint, other than a request for costs and attorneys' fees, relates *solely* to the Ward 1 council seat race. Specifically, the Complaint asks the court to (1) "nullify, and set aside the results of the election *for Council member, Ward One. . . .* "; (2) issue a "writ of mandamus directing the Mayor and Clerk of the City of Alabaster . . . to conduct a re-count of the votes cast *in the Ward One election* . . . [and] count all votes cast from the [annexed residents'] sub-division. . . . "; and (3) issue a "Preliminary and Permanent Injunction . . . enjoining the City . . . from filling *the office of Ward One. . . .* " Petition at 24a-25a (emphasis added). Petitioners requested no relief with respect to the other six council wards from which they were also excluded.

Harris and the other Respondents moved to dismiss the Complaint because the relief sought would have the effect of assigning the Weatherly voters to Ward 1 – exactly the action the Attorney General's objection had prohibited. The United States, as *amicus curiae*, also argued for dismissal on this basis. The trial court granted the motions to dismiss, correctly concluding that "[t]he relief sought by the plaintiffs in this cause . . . would only be available through disregarding the clearly established federal law." Petition at 19a. On appeal, the Alabama

Supreme Court affirmed the trial court, similarly concluding that "we are unable to afford the plaintiffs the relief they request without doing violence to § 5." Petition at 10a.

B. Facts.

According to the 1990 Census, the City had a total population of 14,732 persons, of whom 1,617 (11%) were black. The City is governed by a mayor, who is elected city-wide, and a seven-member city council, with one member of the council elected from each of seven wards. This mayor-council form of government, as well as the districting plan used to elect members of the city council, were precleared by the Attorney General in 1991. Under the 1991 precleared districting plan, Ward 1 had a majority-black population, while the other six council wards had populations in which the vast majority of voters were white.

Alabama law requires the City to hold mayoral and city council elections every four years (in presidential election years) on the fourth Tuesday in August. Ala. Code § 11-46-20(a) and § 11-46-21(a). The election at issue was a regularly scheduled election.

The City has experienced substantial growth during the past decade. Between 1992 and 2000, the City adopted 58 new annexations and one de-annexation. The City designated each of the annexations to existing council wards. Of these annexations, 42 were residential and 16 were commercial. Two of the residential annexations, which took place in the Weatherly subdivision in 1994

and 1996, are at issue in the present case. Petitioners live in these annexed Weatherly areas.

On or about May 30, 2000, pursuant to Section 5 and the regulations promulgated thereunder, the City submitted for review by the Attorney General the 58 annexations, the designation of all the annexations to various council wards, and the de-annexation. In July of 2000, the Attorney General precleared the 16 commercial annexations, along with their designations to council wards, precleared the de-annexation, and requested additional information regarding the remaining 42 residential annexations. In light of the impending August 22 municipal election, the City asked the Attorney General to expedite the decision on the remaining annexations.

By letter dated August 16, 2000 (six days before the scheduled election), the Attorney General precleared 40 of the residential annexations, along with the City's designation of the annexations to wards. The Attorney General also precleared the two Weatherly annexations at issue. However, the Attorney General objected to the designation of these two annexations to Ward 1. Noting that the inclusion of the annexed residents in Ward 1 would change the City's only majority-black ward to majority-white, the Attorney General stated that "it appears that the retrogression caused by the proposed Ward 1 annexations would seriously threaten, if not eliminate, the only opportunity minority voters currently have to elect candidates of their choice to city office." The Attorney General's letter stated:

> Where an annexation significantly decreases minority voting strength, the reasons for the annexation must be objectively verifiable, and

> legitimate, and the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community. *City of Richmond v. United States*, 422 U.S. 358 at 371-73 (1975). Here the designation of these annexations to Ward 1 is likely to result in the elimination of representation for a minority community. . . .
>
> Thus, the city has not carried its burden of showing that the post-annexation election system will fairly reflect the post-annexation strength of the minority community. . . . The city has proffered few reasons for its refusal to ameliorate the retrogressive impact of the proposed Ward 1 annexations. . . .

This letter further instructed the City in no uncertain terms that the votes of the annexed Weatherly residents could *not* be counted toward the Ward 1 vote totals in the upcoming election:

> [U]ntil the objection is withdrawn or a judgment from the District of Columbia Court [preclearing the change] is obtained, the objection by the Attorney General remains in effect and the designation of Ordinance Nos. 94-338 and 96-410 [i.e., the Weatherly annexations] to Council Ward 1 continue to be legally unenforceable. Therefore, residents of the areas annexed by Ordinance Nos. 94-338 and 96-410 may vote for the mayoral position in the upcoming [August 22] election but may not vote in the Ward 1 city council race.

In a response letter dated August 17, 2000, the City informed the Attorney General that the City would

comply with the Attorney General's instructions by using the following procedure:

> Pursuant to the letter, persons living in the two Weatherly annexed areas will be allowed to vote in the mayoral races, but will not be allowed to participate or cast officially counted votes in the Ward 1 council race. The Ward 1 council vote will be legally certified without consideration of votes of persons living in the two Weatherly annexed areas.

The City held the election as scheduled on August 22. In accord with the Attorney General's objection and the City's plan to comply with this objection, the City allowed residents in the Weatherly annexation to cast votes for mayor. Because the election ballots had already been printed, the ballots used in Weatherly also reflected the Ward 1 council race. However, the City kept the ballots cast in Weatherly separate from the other ballots to ensure that the votes of these residents would not be counted in the official vote totals for the Ward 1 council race.

In this election, there were 103 ballots cast in Weatherly. All of these ballots reflected votes for mayor, and these votes were certified as part of the official totals in the mayoral election. On 101 of these ballots, voters also attempted to cast votes in the Ward 1 race. Harris stipulates that all of these 101 votes were cast for Harris' opponent, Todd Goode ("Goode").

Harris was certified as the winner of the Ward 1 council seat race. Without including the 101 attempted votes of the annexed Weatherly residents, there were 613 votes cast in the Ward 1 race. Of these, 326 (53.18%) were

cast for Harris, while 287 (46.82%) were cast for Goode. Therefore, if the Attorney General had not objected, and the 101 ballots cast by the annexed Weatherly residents were counted toward the official totals in that race, Goode would have prevailed.

REASONS FOR DENYING THE WRIT

This Case Involves the Application of Well-Established Law Under Section 5 of the Voting Rights Act and Does Not Merit a Grant of Certiorari.

This garden-variety election contest case does not warrant certiorari review by this Court. There is no split in authority among the circuits or the state courts of last resort in terms of the applicable law, nor is there a conflict with Supreme Court precedent. Rather, the courts below correctly applied clearly-established precedent from this Court in dismissing Petitioners' claims under Section 5. In this case, the Attorney General objected to the designation of annexed residents to Ward 1. The courts below have no authority to review the Attorney General's objection, and are forbidden from granting any relief which would contravene this objection by giving effect to the Ward 1 designation. Thus, the lower courts had no jurisdiction to grant the relief requested in the Complaint, which is merely an election contest that seeks to have the votes of the annexed residents included in the Ward 1 race and to have Harris' challenger declared the winner of that race. Accordingly, the Complaint of Petitioners was properly dismissed.

A. No Issue of National Importance is Raised by Petitioners Because this Case is Merely an Attempt to Challenge a Particular Election Result Notwithstanding a Section 5 Objection.

Petitioners have attempted to characterize their lawsuit as a constitutional challenge to their exclusion from the entire council election which was held by the City on August 22, 2000. However, this characterization simply ignores Petitioners' Complaint.

The *only* relief actually requested in the Complaint relates *not* to the city council election in general, but to the Ward 1 race in particular. Petitioners' Complaint requested only that the Ward 1 race be nullified, that the votes of the annexed residents be certified as legal votes in the Ward 1 race, and that Harris be enjoined from taking office as Ward 1 council member pending a ruling on the merits. Petition at 24a-25a. This suggests that Petitioners' lawsuit is merely a statutory election contest of the Ward 1 race. *See* Ala. Code § 11-46-70 (relief available in an election contest is limited to deciding who among the candidates received the most legal votes, declaring that person the winner, and declaring a runoff if there is a tie); Ala. Code. § 17-15-6 (court hearing election contest may not exercise equitable powers).[2]

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[2] Petitioners now argue that their case should not have been dismissed because the City could have obtained a "delay in the election" which "would have preserved the right of all individuals to vote." Petition at 14. Since the Petitioners did not pray that the Alabama trial court delay the election, they have waived this relief.

Had Petitioners filed their Complaint in federal court rather than state court, additional remedies may have been available to

If Petitioners were truly complaining of their unconstitutional exclusion from the entire city council election, they would have made some request for relief regarding the other six council wards besides Ward 1 from which they were *equally* excluded. Only those voters who are qualified under law may vote in a particular election. Petitioners certainly had no right to vote in Ward 1 as opposed to other wards, especially given the Attorney General's specific objection to the Ward 1 designation based on the potential for racial discrimination. Since Petitioners have requested no relief other than statutory election contest relief with respect to the Ward 1 race, they have not sufficiently stated any claim relating to their exclusion from the city council election as a whole and have not stated an issue that merits a grant of certiorari.

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them. *See, e.g., Chatman v. Spillers*, 44 F.3d 923, 925 (11th Cir. 1995) (federal district court "has the power to order interim or special elections" even where plan has been precleared only in part) (citing *Clark v. Roemer*, 500 U.S. 646 (1991), and *Campos v. City of Houston*, 968 F.2d 446 (5th Cir. 1992)). The lack of relief to Petitioners is based on (1) their choice of forum – state court rather than federal court, and (2) their choice of remedies. The Alabama Supreme Court held it was without jurisdiction to order either relief because both would violate Section 5. This case does not present an issue of national importance that should be resolved by the Court regarding a conflict between individual voting rights and a municipality's obligations under Section 5 of the Voting Rights Act; rather, it is a case about the limitations inherent in Petitioners' choice to bring their case as an election contest in state court.

B. Petitioners Have Not Demonstrated That There is a Split in Authority in the Lower Courts.

The rules of this Court provide that an important consideration in determining whether to grant certiorari is that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Rule 10(b), Rules of the Supreme Court of the United States. The Petitioners have pointed to no split in the circuits or the state supreme courts over how to handle situations such as the present one.

C. The Decision Below is Consistent with Decisions of this Court.

It is black letter law that voting changes which have not been precleared under Section 5 cannot be implemented. The application of Section 5 in this regard is set forth in this Court's unanimous decisions in *Lopez v. Monterey County*, 519 U.S. 9 (1996), and *Clark v. Roemer*, 500 U.S. 646 (1991). "A jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change." *Lopez*, 519 U.S. at 20. "A voting change in a covered jurisdiction 'will not be effective as law until and unless cleared' pursuant to one of these two methods." *Clark*, 500 U.S. at 652 (quoting *Connor v. Waller*, 421 U.S. 656 (1975)). "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.' " *Clark*, 500 U.S. at 652 (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982)).

This Court has repeatedly affirmed orders of three-judge federal district courts which permit elections to go forward as to precleared changes but which enjoin those elections as to changes which have not been precleared. Even though this result causes different treatment of voters living in a single jurisdiction, this Court has never suggested an equal protection violation in these instances. *See Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981) (three-judge court), *additional proceedings* at 521 F. Supp. 934, 943-44 (N.D. Miss. 1981) (three-judge court), *aff'd*, 456 U.S. 1002 (1982) (ordered elections to "proceed as scheduled," allowing all electors within pre-annexation city limits and three precleared areas to vote, but "precluding from voting or running for office only those electors residing in the [objected-to] annexation"); *Lopez v. Monterey County*, 519 U.S. 9, 22 (1996) (unprecleared changes could not be given effect even though this "would leave the County without a judicial election system"); *Hubbard v. City of Grenada*, No. 96-172, 1998 WL 527084 (N.D. Miss., July 1, 1998) (three-judge court), *aff'd*, 525 U.S. 1038 (1998) (city must conduct elections under last precleared districting plan, excluding voters in unprecleared annexed area); *Clark v. Roemer*, 498 U.S. 953, *order modified*, 498 U.S. 954 (1990) (judicial elections allowed only in precleared districts); *United States v. Louisiana*, 952 F. Supp. 1151, 1179 (W.D. La.) (three-judge court), *aff'd*, 521 U.S. 1101 (1997) (city residents allowed to vote for city council but not unprecleared city court positions).

These cases show that the City properly proceeded with the August 22, 2000 election as to precleared changes but not as to unprecleared changes. The City

submitted 58 annexations for preclearance in July of 2000 – and 56 of the 58 annexations, along with their ward designations, were in fact precleared before the election. On August 16, 2000, six days before the election, the Attorney General objected to the ward designations of the remaining 2 annexations which are at issue. Faced with this objection, the City could not have simply counted the votes of the annexed Weatherly residents in the Ward 1 race, as this would have meant ignoring the Attorney General's objection and illegally implementing unprecleared changes. The City also could not have delayed the election or assigned the annexed residents to another ward without having first obtained preclearance of these changes. In short, in order to comply with Section 5, the City had no other option except to allow the election to proceed as it did. Because the City acted in compliance with the precedents of this Court, there is no basis for granting a writ of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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